82-5793

NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JIMMY LEE HORTON

Petitioner,

-v.-

STATE OF GEORGIA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1.

Whether the imposition of the death penalty was disproportionate to the sentences imposed in other similar cases in violation of petitioner's Eighth and Fourteenth Amendment rights under the United States Constitution?

2.

Whether petitioner was deprived of having the jury consider a possible mitigating factor in the sentencing phase of the trial in violation of his Eighth and Fourteenth Amendment rights under the United States Constitution?

3.

Whether Georgia Code Ann. § 27-2534.1 (b) (2) is unconstitutional in that same allows a jury to inflict the death penalty under circumstances where a defendant's crime does not reflect consciousness materially more depraved than that of any person guilty of murder in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

4.

Whether the court's charge to the jury at the sentencing phase of the trial failed to guide and focus the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

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_____ Term, 1982

No. _____

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Comes now JIMMY LEE HORTON through legal counsel, and files this petition for the Writ of Certiorari to issue to review the judgment of the Supreme Court of Georgia entered September 8, 1982.

CITATION TO OPINION BELOW

A copy of the opinion of the Supreme Court of Georgia, reported at _____Ga. _____, 295 SE2d 281(1982), is attached hereto as Appendix A. Said Court is the highest appellate court of the State of Georgia.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on September 8, 1982. A motion for a rehearing was denied by the Supreme Court of Georgia on the 28th day of September, 1982, as is reflected at the top of the page, first page, of said attached opinion. There was no order respecting the granting of an extention of time in which to petition for certiorari. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3), petitioner having asserted in this Court and below deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

" . . . nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law."

This case also involves Ga. Code Ann. § 27-2534.1 (b) (2), as follows:

"In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

"(2) . . . the offense of murder was committed while the offender was engaged in the commission of burglary . . ."

This case also involves Ga. Code Ann. § 27-2534.1 (c) in revelant part:

" . . . unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death penalty shall not be imposed."

This case also involves Ga. Code Ann. § 27-2511 in relevant part as follows:

" . . . any person who, after having been three times convicted under the laws of this State of felonies, or

under the laws of any other State or of the United States, of crimes which, if committed within this State would be felonies, commits a felony within this State other than a capital felony, must, upnn conviction of such fourth offense, or of subsequent offenses, serve the maximum time provided in the sentence of the jury or the judge based upon such conviction, and shall not be eligible for parole until the maximum sentence has been served . ."

Georgia Code Ann. § 26-1601 provides in relevant part:

" . . A person convicted of burglary shall be punished by imprisonment for not less than one nor more than 20 years."

STATEMENT OF FACTS

Petitioner, a black man, was tried, convicted and sentenced to death on February 27, 1981 in the Superior Court of Bibb County, Georgia, for the murder of W. Donald Thompson, a white District Attorney for said county.[1] In one indictment,[2] he was charged with murder and two counts of burglary. As to the burglary counts, in conformity with Georgia Code Section 27-2511, petitioner was indicted as an habitual offender. He was convicted by the jury on both burglary counts. In conformity with said code section, the court sentenced petitioner to serve 20 years on each burglary count, said sentences to run consecutively to the death sentence and concurrently with one another (T. 1135, Vol. 5).[3]

(1) The Facts Surrounding the Crime

On November 28, 1980, the petitioner herein, Jimmy Lee Horton, along with Pless Brown, Jr., borrowed a 1976 Ford pick-up truck from Hamp Davis (T. 740).

At approximately 6:30 p.m. on said date, Willie James Griffin left his home in Macon, Georgia to go shopping (T. 553). While he was gone, Horton and Brown entered the Griffin residence and stole his television set. Hamp Davis stayed at

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1 / The victim of the homicide happened to be the District Attorney. He was not the victim because he was the District Attorney.

2 / A copy of the indictment is annexed as Appendix B.

3 / Each reference to the transcript of petitioner's trial in the Superior Court of Bibb County, Georgia, will be indicated by the abbreviation "T.".

the back fence (T. 892) and helped Horton lift the T.V. over the fence (T. 891). While Davis and Horton were carrying the T.V., Brown was inside the house stealing Griffin's pistol and ammunition (T. 890).

Later that evening Horton and Brown sold Griffin's T.V. to Eudell and Horace Graham with the assistance of Ann Davis, the wife of Hamp Davis (T. 585, 595, 891).

At approximately 11:00 p.m. that night, Horton and Brown broke into Sherrel Grant's apartment in a Macon Apartment complex (T. 892). While inside the apartment, Brown discovered Ms. Grant's .22 caliber pistol, and he gave Horton the Griffin pistol (T. 892). While the furniture Brown wanted to steal from Ms Grant's apartment (T. 892) was being moved, Horton and Brown swapped pistols several times (T. 901).

While Horton and Brown were inside the apartment, Ms. Grant and Don Thompson, the District Attorney of this Circuit (T. 551) returned (T. 893, 679). Ms. Grant and Mr. Thompson had been to dinner at a friend's home, and Mr. Thompson had left there the pistol he usually carried (T. 676, 679, 698). Mr. Thompson had been drinking and his blood alcohol level was .19 per cent (T. 695, 870). When they arrived, Ms. Grant noticed her front door was not latched, and looking inside she noticed that some furniture was missing (T. 679). Mr. Thompson went next door, borrowed a pistol and loaded it (T. 679). He then went inside Ms. Grant's apartment (T. 681).

In the meantime, Horton and Brown noticed the arrival of Ms. Grant and Mr. Thompson, and they left the apartment through the rear door (T. 893). The Davis truck was parked at the front of the apartment building, so that both Horton and Brown had to run across the area within the sight of Ms. Grant in order to reach the truck (T. 893, 687). As Horton ran past Ms.

Grant, at a distance of about 55 feet from her (T. 804), he fired three shots in her general direction (T. 893, 689). These shots struck the apartment building approximately 25 feet from where Ms. Grant was standing (T. 802, 810). Horton testified he used Ms. Grant's silver pistol when he fired those shots (T. 893), while Ms. Grant testified he used a black pistol like the one stolen from Willie James Griffin's house (T. 687). However, Ms. Grant at trial also identified a silver automatic pistol as the one which Horton used (T. 681). The bullets which struck the apartment building were recovered and identified as having been manufactured by Remington (T. 866).

Testimony regarding the sequence of the shots that followed varied from witness to witness. One theory presented by the evidence is that at about the time Horton and Brown reached the truck, Ms. Grant was pulled into a neighbor's apartment (T. 716, 619, 897). Horton testified that Brown fired this second volley while leaning out of the passenger side door of the truck (T. 897, 898, 899). All witnesses who saw the pair with the truck that night testified Horton was the driver and Brown was the passenger (T. 565, 587, 598, 683, 740). Horton's testimony was supported by resident manager Carol Baker who saw four shots fired from the passenger side of the truck just before it pulled away (T. 718).

Mr. Thompson was found in the rear of the apartment building (T. 611, 693, 721). He had been struck by a single .22 caliber bullet and the bleeding from his wounds resulted in his death. (T. 831).

Horton's testimony added a second theory. He testified Brown shot Mr. Thompson at the rear of the apartment near where the body was found (T. 897.) Medical testimony indicated

it was possible for a person who had sustained the wounds sustained by Mr. Thompson to have either fallen where he was shot or to have run from the corner of the building to the place where his body was found (T. 833, 840).

Following the second volley of shots, the truck drove away from the scene. Horton and Brown returned to Horton's residence where Brown decided to take the silver pistol belonging to Ms. Grant and leave the black pistol belonging to Willie James Griffin with Horton (T. 900).

The truck was eventually traced to Hamp Davis who was questioned on December 15 and 16, 1980 from 4:45 p.m. until 4:00 a.m. After he had been questioned for 7 to 8 hours, and he had been led to believe the police would try to pin the homicide on his brothers, Davis told the police Horton and Brown had borrowed the truck, and Horton had admitted the offense of murder (T. 742, 753). Horton denied having this conversation with Davis (T. 903), and he also denied shooting Mr. Thompson (T. 904).

Based on the information given by Davis, Horton was arrested on December 16, 1980. Subsequently, the Griffin pistol was discovered in Horton's bedroom by Officer Janice Gordon (T. 787). This pistol was identified as the one which fired the bullet which killed Mr. Thompson (T. 854). This bullet was a CCI brand (T. 863).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The issues raised in Questions I and II herein were raised at the trial in the court below. The same issues were again raised in the trial court by an amended motion for a new trial, the same having been overruled. By proper appellate procedure these issues were reasserted in the Georgia Supreme Court. These issues were there rejected.

The issues contained in Questions III and IV of this petition, though not raised in the lower court, were presented to the Supreme Court of Georgia, that court deciding those issues on their merits against petitioner.

Question I of this petition was addressed by the Georgia Supreme Court in divisions 13 and 14 of the attached opinion, while Question II was addressed in division 4 of said opinion. Question III was addressed in division 12 and Question IV was dealt with in division 8 thereof.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION OF THE DEATH PENALTY WAS DISPROPORTIONATE TO THE SENTENCES IMPOSED IN OTHER SIMILAR CASES IN VIOLATION OF PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Under the Georgia capital punishment statute (Ga. Code Ann. § 27-2534.1 (c)) at least one aggravating circumstance must be found by the jury before a death sentence is authorized. Here, the jury found the existence of only one aggravating circumstance (Ga. Code Ann. § 27-2534.1 (b)(2)):

> "The offense of murder . . . was committed while the offender was engaged in the commission of burglary.. "

Furman v. Georgia, 408 U.S. 238 (1972) teaches us a death sentence cannot be imposed in an arbitrary or capricious manner. Gregg v. Georgia, 428 U.S. 153 at 158 tell us the death penalty is an extreme sanction, suitable to the most extreme of crimes.

Gregg, supra, at page 198, points out as a safeguard against arbitrariness and caprice, the Georgia statutory scheme, among other things, requires the Georgia Supreme Court to determine whether the sentence is disproportionate to those sentences imposed in similar cases.

The facts of this case are not so extreme as to warrant the death penalty, and the imposition of the death penalty is disproportionate to the sentences generally imposed in other similar cases. The contention here is there simply is not enough aggravation in the matter to elevate the situation to a death penalty level.

On the last page of the attached opinion, the Georgia Supreme Court in an Appendix lists five comparison cases as a basis for upholding this death sentence. Petitioner con-

tends each of those cases involve a crime that reflects consciousness materially more depraved than that reflected here. Not one case cited by the Supreme Court of Georgia makes for meaningful and realistic comparison.

The first case the Georgia Supreme Court cited in comparison is Bowden v. State, 239 Ga. 821, 238 SE2d 905 (1977). The opinion in that case states:

> "The evidence showed a planned invasion of the home of the victim and her elderly mother, conceived by appellant and his juvenile companion while in their employ. The two entered the victim's home armed with a pellet gun 'to knock anyone out who might interfere' and Bowden viciously beat and stabbed Mrs. Stryker to death and beat her invalid mother so badly the injuries were evident for weeks afterward."

The language last quoted negates a comparison.

The next case cited is Stephens v. State, 237 Ga. 259, 227 SE2d 261 (1976). That case does not present a factual situation which would be the basis for a meaningful comparison. There, Stephens was burglarizing a house. The victim, a cripple and seven inches shorter than defendant, drove up in his auto and was snatched therefrom by defendant. Defendant proceeded to strike him in the face several times. The victim begged defendant not to hit him again and offered him money in exchange for his life. Defendant took the money then kicked the victim. Stephens then hit the victim with a pistol, kidnapped him and drove to a pasture. The victim tried to escape by hobbling away, but was chased down and robbed. Stephens then stuck the gun in the victim's ear and fired twice, killing him.

The third case cited by the Georgia Supreme Court was Moore v. State, 233 Ga. 861, 213 SE2d 829 (1975). In that case defendant and George Curtis planned to take the money of Fredger Stapleton, then burn the fellow up in his room. Moore, in the late evening, entered Stapleton's home through the window, suprising Stapleton. Inside, a shootout followed in which the victim was shot twice in the chest. After shooting him, Moore took two billfolds from his pockets and carried away his shotgun.

We note here that in Moore v. Balkcom, 513 F. Supp. 803 - 818 (federal habeas) this death sentence was vacated and remanded back to the Superior Court, that Court saying:

> "The Court quickly determines that 'petitioner's crimes cannot be said to have reflected consciousness materially more 'depraved' than that of any person guilty of murder.' 446 U.S., at 432 - 33. The petitioner's case is thus held to be indistinguishable from the many cases in which the death penalty was not imposed. Accordingly, his death sentence is reversed."

As a comparison case, the Georgia Supreme Court also cited Callahan v. State, 229 Ga. 737, 194 SE2d 431 (1971). The opinion in that case states:

> "There was testimony that the victim, a young, inexperienced police officer, responded to a burglar alarm; that upon apprehending two men, one the appellant, he was disarmed and thrown to the ground; that both men violently and repeatedly stomped him unconscious; and that the appellant then pointed the pistol in the victim's face and fired it three times. The victim died several hours later."

Callahan seems to be endowed with acts of extreme cruelty not present in the case at bar.

The final case cited by the Georgia court for comparison purposes was Pass v. State, 227 Ga. 730, 182 SE2d 779 (1971) wherein defendant was convicted of two counts of murder and sentenced to death. The opinion itself does not seem to set out the facts of the case with any specificity. However, the case of Moore v. Balkcom, 513 F. Supp. at 815 purports to give a factual synopsis of Pass, wherein the following language is found:

> "The defendant broke into a home and ransacked it, stealing a variety of items. The defendant was suprised by the residents in the midst of his crime. Both the victims, husband and wife, were found shot through the head. The husband's head was lacerated, apparently as a result of having been beaten with a baseball bat which was found nearby."

This double murder situation seems to have a horror factor unpresent in the case at hand. To make comparison here would be unrealistic.

The cases listed next below are burglary-murder type situations wherein adult defendants were given life sentences.

Smith v. State, 245 Ga. 168, 263 SE2d 910 (1980)

Bryant v. State, 236 Ga. 790, 225 SE2d 309 (1976)

Burke v. State, 248 Ga. 124, 281 SE2d 607 (1981)

In Smith v. State, supra, 245 Ga. 168, it seems a special deputy sheriff stopped his vehicle to investigate a burglary in progress at a residence. The defendant, one of the burglars, got in a tussle with the deputy. The deputy then attempted to get his rifle from his car, but the defendant got it and killed the deputy. A life sentence was given.

In Bryant v. State, supra, 236 Ga. 790, the defendant cut his way into a house with a knife. One of the occupants, a seventy-two year old man, and defendant began to scuffle,

the defendant cutting him with a knife more than once. The scuffle led out to the front porch where the defendant axed the fellow to death. He was given a life sentence on the murder.

In Burke v. State, supra, 248 Ga. 124, two men investigating a burglary in progress at the home of a neighbor got into a shoot out with the burglars. Both men investigating the burglary were shot, one fatally. The defendant received a life sentence for felony-murder.

The most similar case to the case at bar is that of the co-defendant, Pless Brown, Jr. He received a life sentence after being convicted of murder. We respectfully contend there is no material distinction between petitioner's case and that of his co-defendant.

The evidence showed that Horton and Brown were burglarizing Sherell Grant's apartment when she and Mr. Thompson returned (T. 893, 678). Both Horton and Brown were apparently armed, one with a silver pistol and the other with a black pistol (T. 892). Horton and Brown left the apartment through the rear door (T. 893) while Mr. Thompson borrowed a pistol (T. 679) and pursued them (T. 681). After several shots were fired, Mr. Thompson's body was found at the rear of the apartments (T. 833, 840).

The only direct evidence as to who may have fired the fatal shot came from the testimony of Carol Baker and Jimmy Horton. Ms. Baker said that she saw four shots fired from the passenger side of the truck in the direction of Mr. Thompson (T. 718). Brown was the passenger in the truck (T. 565, 587, 598, 683, 740). Horton testified he did not shoot Mr. Thompson (T. 904).

The evidence indicating that Horton fired the fatal shot was Ms. Grant's testimony that he was armed with the

black gun (T. 687), and the opinion of the Crime Lab expert that the black pistol found at Horton's house had fired the fatal shot (t. 854).

Thus, there is evidence which could indicate both Brown and Horton fired at Mr. Thompson, that Brown's shots happened to miss while one of Horton's shots struck the victim. The state argued this very position in Brown's trial (T. 55, Transcript of Closing Argument, State v. Pless Brown, Jr. Argument for the state by Mr. Briley):

> "Mr. Brown fired on him. That's where those four shots came from. And, ladies and gentlemen, that wouldn't require that he shoot through a car. Not at all. And if he's aiming the gun at that time of the night he's going to throw it up like that which would take it upon in the plain sight of anybody across the street. Look at that. He ran for those hedges back there. He ran to those hedges very easily. He fired at him. And when he fired at him Horton turned around and fired at him. They were both firing at him. Yes, I think Horton's gun killed him. I think Horton's bullet killed him. I think Horton's bullet killed him. But I think Horton turned and fired on him becauuse Brown was firing at him. I ask you does that make Brown any less guilty than Horton? Maybe he'd have gone on and got in the truck and driven off. Maybe they'd been caught for Burglary. But there wouldn't have been a man dead."

And Mr. Sparks argued for the state as follows (T. 30, 31, Transcript of Closing Argument, State v. Pless Brown, Jr.):

> "Now, in this case as you know--I'm going to make this brief comment on the facts. No one knows for sure who was--who had this gun in his hand and who

pointed it at Don Thompson and who pulled the trigger and sent that bullet coursing through his arm, his heart, his lungs or his aorta. In other words, the State had no eyewitness who could say, 'I saw Brown or I saw Horton level that gun at Thompson and shoot and I saw Thompson fall.' We do know that both of them were there. And we do know that Don Thompson was shot and we know that he was shot when he went out and tried to apprehend the burglars."

And finally, during the penalty phase of the trial, Mr. Briley for the state argued (T. 97, Transcript of Closing Argument, State v. Pless Brown, Jr.):

"Jimmy Lee Horton had his back to Mr. Thompson. He had done his shooting at Miss Grant. He had his back to Mr. Thompson. He was heading for that truck. He was heading for that truck. And then all of a sudden, POW, POW, POW, POW. And Jimmy Lee Horton whirls around and he fires too. You know, I think they got rid of the gun that fired the most shots in his direction. I really don't think either one of them knew who had killed Mr. Thompson. But the defendant over here, who sayd that he was in the truck when the shooting occurred, told you, 'Mr. Thompson looked at me and told me, hold it, freeze, hold it."

* * * *

As we understand the development of the capital punishment laws, the death penalty is reserved for those murders which have been characterized as "extreme cases" of "outrageous cases."

Gregg v. Georgia, 428 U.S. 153 at 184:

"Indeed, the decision that capital punishment may be

> the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."

We respectfully say this case does not rise to that level.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER WAS DEPRIVED OF HAVING THE JURY CONSIDER A POSSIBLE MITIGATING FACTOR IN THE SENTENCING PHASE OF THE TRIAL IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In one indictment, petitioner was indicted for murder and two counts of burglary. As to the burglary counts, in conformity with Georgia Code Section 27-2511, the petitioner was indicted as an habitual offender, the indictment alleging three prior felonies. The petitioner was convicted by the jury on both burglary counts of the indictment. His prior record was introduced in evidence, the same consisting of more than three prior felonies (T. 1064, 1065, Vol. 5).

In compliance with said code section 27-2511, the court sentenced petitioner to serve 20 years on each burglary count, said sentences to run consecutively to the death sentence and concurrently with one another (T. 1135, Vol 5).

The lower court erred in refusing to permit counsel for the defendant in the sentencing stage to argue to the jury that the court had no other choice but to sentence petitioner to twenty years in the penitentiary, without parole, on a burglary conviction since he had been indicted and convicted as an habitual offender. Petitioner contends the error was harmful for the reason it deprived him of having the jury consider this circumstance of the case as a possible mitigating factor, the same being in violation of his 8th Amendment rights under the Constitution of the United States and his due process rights under the Fourteenth Amendment to the United States Constitution.

During the argument by defense counsel, the following

transpired (T. 1101, line 10 - 1103, line 6, Vol. 5):

"All right. You have found him guilty of murder. You have found him guilty of a second burglary. You see there? These things Mr. Briley has been flaunting around here? The convictions, his prior record, these are his. He has been indicted on the burglary counts as being a habitual violator.

MR. BRILEY: Your Honor, I don't believe that's in evidence at this time.

MR. WALLACE: Your Honor please, may I respond?

THE COURT: Yes, sir.

MR. WALLACE: I am, under the law, I am authorized to argue anything that this jury might think is in mitigation. And under the law, the Court has no other alternative --

MR. BRILEY: Your Honor, if he's going to argue it before the jury, there's no point in my objecting to it.

THE COURT: All right. Approach the bench.

(Whereupon, counsel approach the bench.)

MR. WALLACE: Judge, case, after case, after case I read about, the jury want to know if he's going to be able to make parole. We are not authorized to argue the fact that people do make parole, which Joe got mighty close to violating; but they would be authorized to know he would not be paroled in 20 years, because you can't do it under the law.

MR. BRILEY: Your Honor, that is true. But then on the other hand, the Department of Corrections is going to turn him loose when he's served half his sentence.

MR. WALLACE: No, he can't comment on that. But I can comment on this because it's in mitigation, Judge.

You will be making a bad mistake if you don't let me do this.

MR. BRILEY: Not so, not so. Case after case has held neither side has a right to argue that.

THE COURT: I don't think, Mr. Wallace, that you can argue the future disposition of cases.

MR. BRILEY: No sir, he can't. Neither of us can.

MR. WALLACE: Judge, please. You have no alternative but to send a man to 20 years for burglary without parole.

THE COURT: The jury is not concerned with the effect.

MR. WALLACE: But, Judge, please; it's in mitigation, that is in mitigation.

MR. BRILEY: It's not in evidence.

THE COURT: It's not mitigation of the crime.

MR. WALLACE: It don't have to be in mitigation of the crime, Judge. The fact that he was a Sunday School boy might be admissible. That doesn't mitigate the crime.

THE COURT: No, I don't think this can be argued. I sustain the State's objection.

The mandatory sentences required by law on the burglary convictions, along with its lack of parole feature, could well be considered by a juror as a mitigating factor upon which to base a sentence less then death.

In the following death cases in Georgia, during deliberations, the jury made inquiry as to parole elegibility which could well mean if they had known the defendant would not have received parole for a certain length of time, they perhaps would have given a life rather than death sentence. A knowledge of a lack of parole, it seems, would have entered into their thought process in sentence determination. Those

cases are as follows: McGruder v. State, 213 Ga. 259, 265 (7), 98 SE2d 564; Thomas v. State, 240 Ga. 393 (6), 242 SE2d 1; Tucker v. State, 244 Ga. 721 (11), 261 SE2d 635; Corn v. State, 240 Ga. 130, 240 SE2d 694, Willis v. State, 243 Ga. 185 (16), 253 SE2d 70; Greene v. State, 246 Ga. 598, 272 SE2d 475; and Strickland v. State, 247 Ga. 219 (27), 275 SE2d 29.

On the subject of mitigating factors in death penalty cases see Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954:

> " . . . we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis by Court) . . . .
>
> "In upholding the Georgia statute in Gregg, Justices STEWART, POWELL, and STEVENS noted that the statute permitted the jury 'to consider any aggravating or mitigating circumstances,' see Gregg, 428 U.S. at 206, 96 S. Ct., at 2941, and that the Georgia Supreme Court had approved open and far-ranging argument' in presentence hearings ..."

Also see Gregg v. Georgia, 428 U.S. 153 at 203, 204:

> "So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER GA. CODE ANN. § 27-2534.1 (b) (2) IS UNCONSTITUTIONAL IN THAT THE SAME ALLOWS A JURY TO INFLICT THE DEATH PENALTY UNDER CIRCUMSTANCES WHERE A DEFENDANT'S CRIME DOES NOT REFLECT CONSCIOUSNESS MATERIALLY MORE DEPRAVED THAN THAT OF ANY PERSON GUILTY OF MURDER IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The imposition of the death penalty was unauthorized for the reason Ga. Code Ann. § 27-2534.1 (b)(2), as the same relates to the offense of burglary, is unconstitutional in that same allows a jury to inflict the death penalty under circumstances where a defendant's crime does not reflect consciousness materially more depraved than that of any person guilty of murder, thus allowing a jury to act as arbitrarily and capriciously as they desire in deciding whether to impose the death penalty, in violation of the 8th and 14th Amendments to the United States Constitution.

Ga. Code Ann. § 27-2534.1 (b) (2) as it relates to burglary is as follows:

> "The offense of murder . . . was committed while the offender . . . was engaged in the commission of burglary . . . "

In the case at bar, the only statutory aggravating circumstance found by the jury to support this death sentence was that quoted above. Under the Georgia law a jury is authorized to inflict the death penalty if a murder is committed in the commission of a burglary regardless of any of the other circumstances of the case.

Gregg v. Georgia, 428 U.S. at 189:

> "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or

spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

We respectfully contend to authorize a jury to inflict the death penalty solely because a murder was committed in the commission of a burglary allows them to act as arbitrarily and capriciously as they desire. True, the Court must charge a jury on mitigating circumstances. In spite of this, the jury is still authorized to inflict the death sentence in such case no matter what the mitigating circumstances may be.

This proposition is quite vividly illustrated by Moore v. Balkcom, 513 F. Supp. 803 (federal habeas), wherein the defendant had been sentenced to death resulting from a situation where one was killed during the commission of a burglary. In Moore the Court wrote:

"The Court quickly determines that 'petitioner's crimes cannot be said to have reflected consciousness materially more "depraved" than that of any person guilty of murder.' 446 U.S., at 432-33. The petitioner's case is thus held to be indistinguishable from the many cases in which the death penalty was not imposed."

Thus, our death penalty statute authorized a jury to impose the death penalty in cases "indistinguishable from the many cases in which the death penalty was not imposed."

We note here that Jimmy Lee Horton's case is the only one we have been able to locate wherein the only statutory aggravating circumstance supporting the death penalty was that the murder was committed in the commission of a burglary. Neither did the Georgia Supreme Court refer to such a case in its opinion.

Furthermore, in Gregg, supra, the United States Supreme Court indicated appellate review was an important consideration in its finding that the Georgia death penalty statute was generally not unconstitutional.

> "As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for an automatic appeal of all sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.
>
> " . . . Moreover, to guard further against a situation comparable to that presented in Furman, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." Gregg, p. 198.

Also, Justice White commented on the role of the Georgia Supreme Court, "Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statute, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given catagory of crime will be set aside." Gregg, p. 222.

In the instant case, the Georgia Supreme Court has failed in its statutory and constitutional duty to realistically review the imposed sentence. A reading of the five cases alleged by the Georgia Supreme Court to be similar to the instant case reveals that each of the cases involves either a pre-planned or horribly brutal murder, and a factual

situation which is much different from that in the case at hand. These cases are reviewed in Section I., Reasons For Granting The Writ herein. Additionally, the court apparently failed to consider the case of Smith v. State, 245 Ga. 168, in which a life sentence was given to the triggerman in a factually similar murder case.

The Georgia Supreme Court's failure to realistically review the sentence in the instant case shows death sentences are still imposed in Georgia with unconstitutional arbitrariness. Jimmy Lee Horton cannot be said to have reflected consciousness materially more depraved than that of any person guilty of murder.

IV.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE COURT'S CHARGE TO THE JURY ON THE SUBJECT OF MITIGATING CIRCUMSTANCES FAILED TO GUIDE AND FOCUS THE JURY'S OBJECTIVE CONSIDERATION OF THE PARTICULARIZED CIRCUMSTANCES OF THE INDIVIDUAL OFFENSE AND THE INDIVIDUAL OFFENDER IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The court's charge to the jury at the sentencing phase of the trial on the subject of mitigating circumstances was harmful error for the reason same failed to guide and focus the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender, the same being in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

On the subject of mitigating circumstances, the court charged the jury as follows (T. 1112, start line 23):

> "Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame."

At T. 1114, the trial court also charged as follows:

> "Now, I charge you that the defendant contends that mitigating circumstances exist in this case. And in that connection, I charge you that in arriving at your verdict in this case you will consider evidence as to the mitigating circumstances which the defendant contends exist in this case."

The above quoted charges were the only explanations given to the jury concerning the function of mitigating circumstances as they apply to a death peanlty hearing. We

respectfully contend the court's charge to the jury fell far short of guiding and focusing the jury's consideration of the particularized circumstances of the individual offense and the individual offender as required by Lockett v. Ohio, 438 U.S. 586, Jurek v. Texas, 428 U. S. 274, Gregg v. Georgia, 428 U.S. 153 and Chenault v. Stynchcombe, 581 F. 2d 444, as explained in Spivey v. Zant, 661 F. 2d. 464.

C O N C L U S I O N

Petitioner prays a writ issue to review the judgment of the Supreme Court of Georgia.

This 24 day of November, 1982.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify pursuant to Rule 33 of the Rules of the Supreme Court, I have served the following party to this proceeding with a complete copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Georgia by depositing same in the United States Mail, correctly addressed with sufficient postage affixed thereto as follows:

MR. MIKE BOWERS
Attorney General for the State of Georgia
132 State Judicial Building
40 Capital Sq., S.W.
Atlanta, Georgia 30334

This 17 day of November, 1982.

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